

STATE OF MICHIGAN
COURT OF APPEALS

TREND A JONES, Successor Personal
Representative of the Estate of JAMAR CORTEZ
JONES, Deceased,

UNPUBLISHED
January 4, 2007

Plaintiff-Appellee,

and

BOOKER T. JONES and MARGARET A. JONES,
Co-Personal Representatives of the Estate of
JAMAR CORTEZ JONES, Deceased,

Plaintiffs,

v

DETROIT MEDICAL CENTER and SINAI
GRACE HOSPITAL,

No. 262343
Wayne Circuit Court
LC No. 03-327528-NH

Defendants-Appellants,

and

DANNY F. WATSON, M.D. and WILLIAM M.
LEUCHTER, P.C.,

Defendants.

TREND A JONES, Successor Personal
Representative of the Estate of JAMAR CORTEZ
JONES, Deceased,

Plaintiff-Appellee,

and

BOOKER T. JONES and MARGARET A. JONES,
Co-Personal Representatives of the Estate of
JAMAR CORTEZ JONES, Deceased,

Plaintiffs,

v

DETROIT MEDICAL CENTER and SINAI
GRACE HOSPITAL,

Defendants,

and

DANNY F. WATSON, M.D. and WILLIAM M.
LEUCHTER, P.C.,

Defendants-Appellants.

TRENDA JONES, Successor Personal
Representative of the Estate of JAMAR CORTEZ
JONES, Deceased,

Plaintiff-Appellee,

and

BOOKER T. JONES and MARGARET A. JONES,
Co-Personal Representatives of the Estate of
JAMAR CORTEZ JONES, Deceased,

Plaintiffs,

v

DETROIT MEDICAL CENTER and SINAI
GRACE HOSPITAL,

Defendants-Appellants,

and

DANNY F. WATSON, M.D. and WILLIAM M.
LEUCHTER, P.C.,

Defendants.

No. 262347

Wayne Circuit Court
LC No. 03-327528-NH

No. 263259

Wayne Circuit Court
LC No. 03-327528-NH

Before: Sawyer, P.J., and Wilder and Hood*, JJ.

PER CURIAM.

In this wrongful death medical malpractice action originally filed by co-personal representatives Booker T. Jones and Margaret A. Jones on behalf of the estate of decedent Jamar Cortez Jones, and continued by successor personal representative Trenda Jones, defendants Detroit Medical Center, Sinai Grace Hospital, Danny F. Watson, M.D. and William M. Leuchter, P.C. challenge two circuit court orders in these three consolidated appeals. In Docket Nos. 262343 and 262347, defendants appeal by leave granted from an order denying their motions for summary disposition pursuant to MCR 2.116(C)(7). In Docket No. 263259, defendants Detroit Medical Center and Sinai Grace Hospital (the DMC defendants) appeal by leave granted from an order denying their motion for summary disposition on the ground that plaintiff filed an improper affidavit of merit. We reverse and remand.

I

Docket Nos. 262343 and 262347

The parties do not dispute the timing of the following relevant events: (1) the decedent died on October 21, 1999, after an alleged act of malpractice by Dr. Watson on September 24, 1999. Booker and Margaret Jones initially received letters of authority appointing them as co-personal representatives of the decedent's estate on March 19, 2001.¹ Booker and Margaret Jones gave defendants notice of the estate's intent to pursue medical malpractice claims against them on March 11, 2003 and March 13, 2003 and subsequently filed this action on August 19, 2003. On or around September 16, 2004, the trial court entered an order appointing Trenda Jones as personal representative. Trenda Jones signed a ratification form, accepting all acts performed by Booker and Margaret Jones as co-personal representatives. Thereafter, on March 28, 2005, the trial court issued an order appointing Booker and Margaret Jones co-personal representatives of the estate in conjunction with Trenda Jones, *nunc pro tunc*, effective March 10, 2003 and new letters of authority were issued effective March 10, 2003.

Defendants filed motions for summary disposition principally arguing (1) that the August 2003 filing of the complaint had occurred beyond the two-year medical malpractice period of limitation in MCL 600.5805(5), (2) that application of the wrongful death saving period in MCL 600.5852 did not render the complaint timely, (3) that although the original personal representatives gave defendants notice of their intent to bring medical malpractice claims, *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004) required a determination that the giving of notice did not toll the wrongful death saving period, and (4) that pursuant to *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004), the decision in *Waltz* applied retroactively. The DMC defendants additionally maintained that the September 2004 appointment of Trenda Jones as

¹ The letters of authority issued to Booker and Margaret Jones do not include expiration dates.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

successor personal representative did not revive the wrongful death saving period and instead operated to ratify the filing of an untimely complaint.

Plaintiffs answered that MCL 600.5856(d) had tolled the running of the wrongful death savings period and that *Waltz* did not control as Trenda Jones ratified the actions of the original representatives, as contemplated by MCL 700.3701, and because the ratification related back to the time the actions were performed, the complaint was timely filed within two years of Trenda Jones' appointment. Plaintiffs additionally argued that (1) the probate court's *nunc pro tunc* order appointing Booker and Margaret Jones as co-personal representatives rendered the complaint timely as the complaint was filed within two years of their appointment; (2) Booker and Margaret Jones relied on existing case law indicating that the two-year period specified in MCL 600.5852 was itself a statute of limitations when they filed the complaint and retroactive application of *Waltz* would extinguish plaintiffs' cause of action in violation of procedural and substantive due process guarantees, (4) *Ousley* and *Waltz* rendered MCL 600.5852 and MCL 600.5856(d) unconstitutionally vague by failing to give adequate notice of their alleged meaning, (5) interpreting MCL 600.5856(d) as not applying to the two-year period specified in MCL 600.5852 creates two classes of wrongful death plaintiffs with differing periods within which to file suit," i.e., "claimants whose claims do not arise out of alleged medical malpractice" and claimants "whose claims do arise out of alleged medical malpractice," and this discrepancy violates equal protection guarantees, and (6) due to the confusing interaction between MCL 600.5856(d) and MCL 600.5852, the trial court should apply the doctrine of equitable tolling. After conducting a hearing, the trial court denied defendants' motion, reasoning that equitable tolling should apply given the inconsistencies in the law before and after *Waltz*.

Docket No. 263259

Defendants moved to strike plaintiffs' uncertified Pennsylvania affidavit of merit that accompanied the complaint, and grant summary disposition pursuant to MCR 2.116(C)(7) on grounds that the affidavit's lack of a court's certification under seal failed to comply with MCL 600.2102, rendering the affidavit ineffective and the complaint insufficient to toll the medical malpractice period of limitation. After hearing arguments, the trial court denied defendants' motion. Defendants now appeal.

II

We review de novo decisions regarding summary disposition motions. *Waltz, supra* at 647. Whether a period of limitation applies in particular circumstances constitutes a legal question that this Court considers de novo. *Detroit v 19675 Hasse*, 258 Mich App 438, 444-445; 671 NW2d 150 (2003). In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "consider(s) all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Waltz, supra* at 647-648, quoting *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

Questions involving constitutional law and the applicability of equitable doctrines are also reviewed de novo. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004); *Ousley, supra* at 495. Issues of statutory interpretation are also reviewed de novo. *Detroit, supra* at 444.

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III

A. *Waltz*

Defendants first contend the trial court erroneously concluded that MCL 600.5856 operates as a statute of limitation, allowing plaintiffs five years under MCL 600.5852 to file a complaint in a wrongful death medical malpractice action. We agree.

“The statute of limitations for a wrongful death action is governed by the statute of limitations applicable to the underlying theory of liability.” *Eggleston v Bio-Medical Applications of Detroit, Inc.*, 248 Mich App 640, 646; 645 NW2d 279 (2001), rev’d on other grounds 468 Mich 29 (2003). “The general period of limitation for a malpractice action is two years.” *Miller v Mercy Mem Hosp*, 466 Mich 196, 199; 644 N.2d 730 (2002), citing MCL 600.5805(5).² Under the “wrongful death saving provision,” MCL 600.5852, “a personal representative may file a medical malpractice suit on behalf of a deceased person for two years after the letters of authority are issued, as long as that suit is commenced within three years after the two-year malpractice limitations period expired.” *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 572-573; 703 NW2d 115 (2005). Thus, in addition to the two-year period of limitation in MCL 600.5805(5), a personal representative may have at most an additional three years to file a wrongful death medical malpractice claim. *Waltz, supra* at 648-649.

In *Waltz, supra*, the Michigan Supreme Court definitively resolved the question whether the medical malpractice notice tolling provision in MCL 600.5856(d) tolls the wrongful death saving provision in MCL 600.5852. The *Waltz* Court concluded MCL 600.5856(d), “by its express terms,” tolls only the applicable “statute of limitations or repose,” explaining that the wrongful death savings provision is not a statute of limitation or repose, but instead a savings provision. Thus, our Supreme Court held that notice tolling under § 5856(d) does not apply to the wrongful death savings provision. *Waltz, supra* at 655.

Accordingly, we find no merit to plaintiffs’ contention that MCL 600.5856(d) tolled the medical malpractice period of limitation. Here, Booker and Margaret Jones filed this action on August 19, 2003, more than two years beyond the two-year medical malpractice period of limitation, MCL 600.5805(5), which expired on September 24, 2001. Accordingly, no tolling of the medical malpractice period of limitation occurred pursuant to MCL 600.5856(d) because Booker and Margaret Jones gave defendants notice of the estate’s intent to sue outside the two-year period of limitation. See *Waltz, supra* at 651 (explaining that “to toll the period under § 5856(d), [the] plaintiff was required to provide notices of intent in compliance with the provisions of MCL 600.2912b before the expiration of the two-year limitation period”).

² According to 2002 PA 715, former MCL 600.5805(5) was renumbered as subsection (6) effective March 31, 2003. Because subsection (5) prescribed the period of limitation applicable at the time the instant cause of action accrued, MCL 600.5838a(1), this opinion refers to subsection (5).

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Nor do we find any merit in the claim that § 5852 allows a plaintiff to file suit any time within three years after the initial two-year period of limitations has run. This Court previously rejected the same argument in *Farley*, explaining:

We note that the three-year ceiling in this provision does not establish an independent period during which a personal representative may bring suit. Specifically, it does not authorize a personal representative to file suit at any time within three years after the period of limitations has run. Rather, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. As a result, while the three-year ceiling can *shorten* the two-year window during which a personal representative may file suit, it cannot *lengthen* it. [*Farley, supra* at 573 n 16 (emphasis in original).]

Because Booker and Margaret Jones were appointed co-personal representatives within 18 months of decedent's death, and did not file suit within two years of their March 19, 2001 appointment, they may not rely on § 5852 to extend the time in which to bring suit. Consequently, Booker and Margaret Jones commenced this action outside both the two-year medical malpractice period of limitation and the two-year wrongful death saving provision in § 5852.

We similarly find no merit to plaintiffs claim that *Waltz*, decided on April 14, 2004, does not control because the relevant procedural events occurred before the Supreme Court's ruling. In *Ousley, supra* at 495, this Court held that *Waltz* was not limited to prospective application, and applied retroactively. Both our Supreme Court and this Court have expressly and repeatedly held that *Waltz* applies with full retroactivity. See *Forsyth v Hopper*, 472 Mich 929; 697 NW2d 526 (2005); *Wyatt v Oakwood Hosp & Medical Ctrs*, 472 Mich 929; 697 NW2d 528 (2005); *Evans v Hallal*, 472 Mich 929; 697 NW2d 526 (2005); see also *McMiddleton v Bolling*, 267 Mich App 667, 671; 705 NW2d 720 (2005); *Lentini v Urbancic (On Remand)*, 267 Mich App 579, 582 n 3; 705 NW2d 701 (2005). More importantly, the retroactivity conclusion reached in *Ousley* was recently affirmed by a special panel of this Court in *Mullins v St. Joseph Mercy Hosp*, __ Mich App __; __ NW2d __ (June 13, 2006), slip op at 1, 3. We therefore conclude that the Supreme Court's decision in *Waltz* applies retroactively, and that Booker and Margaret Jones' provision of notices of intent to file the instant medical malpractice action did not toll the wrongful death saving period.

B. Equitable Tolling

We also reject plaintiffs' claim that the doctrine of equitable tolling should be applied in this case to allow the untimely initiation of this action beyond the statute of limitations.

In *Ward v Siano*, __ Mich App __; __ NW2d __ (November 14, 2006), this Court held that judicial tolling may not operate to relieve a wrongful death plaintiff from the time restraints imposed by *Waltz*. Accordingly, the trial court erred in applying the doctrine of equitable tolling to allow the untimely initiation of this action beyond the statute of limitations.

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C. Appointment of Successor Representatives

Next, defendants argue the trial court erred in denying defendants' motion for summary disposition since the appointment of successor personal representative Trenda Jones in September 2004, and the March 2005 reappointment of Booker and Margaret Jones as co-successor personal representatives, effective March 10, 2003, failed to render timely Booker and Margaret Jones' August 2003 complaint. We agree.

In *McMiddleton*, this Court reviewed the issue "whether the subsequent appointment of the successor personal representative revived the complaint that the original personal representative filed untimely, i.e., more than two years after the original representative was appointed." *McMiddleton*, *supra* at 671-672. This Court rejected the plaintiff's reliance on *Eggleston*, *supra* at 32-33 (concluding that the successor personal representative had two years from the date of her appointment to timely commence the action):

. . . . [A]pplying MCL 600.5852 and the Supreme Court's ruling in *Eggleston*, it is clear that a successor personal representative cannot rely on the untimely filed complaint that was filed before she was appointed

Plaintiff also cites MCL 700.3701, asserting that the successor personal representative's powers "relate back in time to give acts by the person appointed that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment." Plaintiff also asserts that, the same statute states, "'A personal representative may ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative.'" The problem with this argument is that the original personal representative filed the complaint more than two years after she had been appointed; in other words, she filed the complaint untimely. *This act was not beneficial to the estate.* Further, even if the successor personal representative ratifies this act *she is only ratifying the filing of an untimely complaint.* Therefore, we conclude that *MCL 700.3701 does not support the conclusion that the appointment of a successor personal representative can render timely an untimely complaint filed by the original personal representative.* [*McMiddleton*, *supra* at 672-674 (emphasis added).]

Accordingly, the *McMiddleton* Court held a successor personal representative has the authority to file a second lawsuit, despite the initial representative having filed an untimely one, provided the second complaint is otherwise timely under MCL 600.5852 and *Eggleston*. *Id.* at 672-673. Here, Trenda Jones never filed a complaint subsequent to Booker and Margaret Jones' untimely filing of the original complaint. Thus, we find no merit in plaintiffs' contention that Trenda Jones' ratification of the actions taken by Booker and Margaret Jones rendered the initial complaint timely pursuant to MCL 700.3701, given that this is the precise contention *McMiddleton* rejected.

Similarly, the order appointing Booker and Margaret Jones co-personal representatives in conjunction with Trenda Jones, *nunc pro tunc*, effective March 10, 2003, failed to render timely the complaint. The trial court's order retroactively reappointing Booker and Margaret Jones co-personal representatives, one day before the notice of intent to sue was sent, disregarded the long

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settled principle that a *nunc pro tunc* order cannot be resorted to for the purpose of validating a proceeding which was void at the time it was had. *Eslow v Albion*, 32 Mich 193 (1875). Rather, when used properly, “[a] *nunc pro tunc* entry, in practice, is an entry made now of something which was actually previously done, to have effect as of the former date. Its office is not to supply omitted *action* by the court, but to supply an omission in the record of action really had, but omitted through inadvertence or mistake.” *People v Birmingham*, 62 Mich App 383, 385; 233 NW2d 551(1975), citing *Mallory v Ward Baking Co*, 270 Mich 91, 93; 258 NW 414 (1935) (emphasis in original).

In this case, the trial court’s *nunc pro tunc* substitution of parties did not make timely an already untimely complaint. Because Trenda Jones did not file a second complaint within the statutory time frame, her subsequent appointment merely operated to substitute her in an untimely action already commenced. MCL 700.3613. The reappointment of Booker and Margaret Jones does not alter the fact that Trenda Jones could not ratify an untimely filed complaint by Booker and Margaret Jones as predecessor co-personal representatives, *McMiddleton*, *supra* at 673-674. Accordingly, the claim was time-barred and the trial court improperly denied defendants’ motion for summary disposition.

IV

In light of our determination that the trial court erred by finding the complaint timely filed, we need not address plaintiffs’ additional constitutional claims³ or the DMC defendants’ remaining challenge to the trial court’s denial of their subsequent motion for summary disposition on the basis that the Pennsylvania-notarized affidavit of merit filed with the complaint was not properly certified.

We reverse the trial court’s April 8, 2005, order denying defendants’ summary disposition pursuant to MCR 2.116(C)(7), and remand for entry of an order granting defendants summary disposition. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Harold Hood

³ This Court will generally decline to address constitutional issues when we can resolve an appeal on a nonconstitutional basis. *Pythagorean, Inc v Grand Rapids Twp*, 253 Mich App 525, 527; 656 NW2d 212 (2002).

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